IN THE HIGH COURT OF TANZANIA

AT MTWARA

CRIMINAL APPEAL NO. 67 OF 2012

Original Tandahimba District Court at Tandahimba

Criminal Case No. 7A of 2012

Before: P.A. Ntumo, Esq; RM

ALLY ABDALLAH @ MANYIKE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

Date of last Order – 31/7/2013
Date of Judgment – 02/8/2013

JUDGMENT

KIBELLA, J.

The appellant, Ally Abdallah @ Manyike, appeared before the District Court of Tandahimba at Tandahimba in Criminal Case No.7 of 2010 to answer the charge of rape contrary to section 130(2) (b) and 131(1) of the Penal Code [Cap.16 R.E 2002]. It was alleged that on 26th day of January, 2010 at about 06.00 hours at Namunda village within Tandahimba District in Mtwara Region, the appellant did have sexual intercourse with Eisha d/o Ally @ Nguya without her consent.

The appellant denied the charge. A full trial was conducted and at the end the trial court was satisfied of the guilt of the appellant and convicted him as charged. The mandatory sentence of thirty (30) years

imprisonment was imposed on him. Aggrieved by conviction and sentence he lodged this appeal protesting his innocence.

The brief summary of the evidence which was relied by the trial Magistrate in convicting the appellant was that on 26th January, 2010 the complainant, Eisha Ally Nguya [PW.1] was at her home, and that it was early in the morning when the appellant came and forcefully raped her. That after being raped she went out of her home naked and bleeding up to her daughter PW.2, Fatuman Selemani. PW.2 admitted in her testimony to have been awaken by PW.1 and that she saw PW.1 naked and that PW.1 told her that she was raped. PW.2 decided to inform his brother, and thereafter the complainant [PW.1] was taken to the police where she was issued a PF.3 and later taken to hospital where she was received by PW.5 Dr. Kitemi who told the trial court that he examined the victim and found her with bruises and blood stains in her vagina and filled a PF.3 [Exhibit P1] to that effect.

The appellant was later found by PW.2 and PW.3 with blood stains on his clothes and the Village Executive Officer [VEO] one Juma Mulila [PW.4] was informed of the same. PW.4 told the trial court that having been informed he asked the appellant about the allegation but the appellant denied and on the issue of blood stains, the appellant told PW.4 that the same was not blood but colour paint that he was making on pupils school uniform.

In his defence the appellant denied involvement in rape incidence. He told the trial court that on 26/1/2010 at about 8:00 a.m while coming

from Mtumbata village going to Naputa, he came into contact with two persons who stopped him and they inquired about his name and where he was coming and going and arrested him. That he was taken to VEO where he was informed of rape incidence and denied to have committed rape.

The trial Magistrate was impressed with the prosecution testimony, and as noted herein the appellant was convicted as charged and sentenced accordingly. In this appeal, the appellant filed lengthy grounds of appeal as if it was a written submission. However his major complaint hinges on only three grounds as follows:

1. The identification testimony of a single witness was not watertight as the appellant was a stranger to the victim and no identification parade was conducted.
2. That the prosecution failed to call the independent witness to prove the allegation that the appellant was found with blood stains on his Tshirt.
3. That PW.5 gave his medical opinion without disclosing his qualification, skills and experience.

During the hearing the appellant appeared in person, unrepresented, while the Respondent Republic enjoyed the service of Ms. Mangu learned State Attorney.

In elaboration of his grounds of appeal, the appellant simply repeated what he testified in chief before the trial court. On her part, Ms. Mangu at the outset supported the appeal, first on the ground that the identification testimony by the complainant [PW.1] was insufficient, because, the witness

did not give detailed account on how she was able to identify the appellant as her rapist. Regard being the fact that the victim was very old about 90 years old and that there was possibilities that her vision was poor and therefore mistakenly identified the appellant.

Ms. Mangu further attacked the testimony of PW.2 and PW.3 by submitting that the testimony of PW.2 and PW.3 was a hearsay and based on suspicion. She argued that the basis of suspicion was the fact that the appellant was found with blood stains. Ms. Mangu viewed that hearsay evidence has no evidencial value and that suspicion alone, however strong can not be a basis for conviction.

She viewed further that the testimony of PW.1, needed corroboration as the trial Magistrte failed to address that testimony in terms of section 127(7) of the Evidence Act, of the danger of convicting basing on the testimony of the complainant alone. On sentence she concluded by stating that the same was proper had the appellant been properly convicted.

The issue is whether the testimony on the record is sufficient enough to uphold the appelant's conviction.

Before discussing the merit of the appeal, I find it compelling to briefly address the irregularity occasioned by the trial Magistrate when receiving the testimony of PW.1. During the receiption of the testimony of PW.1 the trial Magistrate at page 4 of the typed proceeding recorded:-

> "**Crt**: Translation from Swahili to Makonde and vise versa by Ahmad Amasha"

Thereafter PW.1 affirmed and her testimony through Ahmad Amasha [translator] was recorded, however the said translator never affirmed or took an oath. He translated while not under oath. In the case of ***Kaitani Daudi Vs. The Repulic, Criminal Appeal No.54 of 2012, HC, at Mtwara [unreported]*** dated 31/7/2013 I held that:-

> "It is now well settled principle that when a witness testifies through an interpreter or translator as the case may be, the said interpreter or translator must do so while under oath... So as to abide on the duty of interpreting or translating nothing but the truth."

I here again insist, that in such situation both the witness and the translator or interpreter must take an oath before the testimony is recorded failure of which renders the testimony unworthy to believe.

On the merit of the appeal the prosecution relied first on the testimony of the complainant [PW.1] and that of PW.5 who prepared the PF.3 [Exhibit P1] as "a direct evidence." Second, they relied on the testimony of PW.2, PW.3 and PW.4 who testified to have seen the appellant with blood stains on his clothes; as "a circumstantial evidence."

Starting with circumstancial evidence, it is a settled principle that, the circumstances under which the inference of guilt may drawn against the accused must be proved beyond reasonable doubt. See the Case of ***Ally Bakari and Pili Bakari v.R [1992] TLR 10 [CA] at page 11*** which held:-

> "Where the evidence against the acsued is whole circumstancial the facts from which an inference adverse to the accused is sought to be drawn must be proved beyond reasonable doubt...."

In our case PW.2 and PW.3 testified that, they saw the complainant bleeding, and later they saw the appellant with blood stains on his clothes. To them they connected the blood found on appellant 's cloth with that of the complainant and concluded that it was the appellant who raped the victim. These are the circumstances which ought to have been proved beyond reasonable doubt. The fact that, the appellant was found with blood, does not necessarily mean he was the one who raped. The blood could have been not that of human, or rather not that of the complainant. To clear this doubt the prosecution ought to have taken the appellant cloth, which was stained with blood; together with the blood sample of the complainant, to the Government Chemist.

It the expert opinion from the Government Chemist, which could have resolved those doubts and revealed that the stains of blood in appellant's clothes was the complainant's blood. That was not done. And therefore, we are left with two views. The first possible view is that, it might have been blood from the complainant as a result of that incidence. But the second possible view is that it might have been not blood but simply a colour paint as the appellant alleges. In law when two possibilities are left hanging, the possibilities that favours the accused must be adopted. See the case of ***Abdullah Jeje @ Mchima Mabula Vs. The Republic, Criminal Appeal No.195 of 2007 CAT at Mtwara [unreported]*** which held:-

> "Now in law where there are two possible views on the evidene one pointing to the guilt of the accused and the other to his innocence, a court of Law must adopt one favorable to the accused."

With regard to the direct testimony, [Eye testimony] I agree with Ms. Mangu that there was no detailed account from PW.1 on how she identified the appellant as her rapist. Her testimony is silent on whether the appellant was known to her before or a stranger. She did not state the kind and intensity of light during the incident day which could have enabled her to identify the appellant, as was held, in the case of ***Waziri Amani v.R [1980] TLR 250.*** Furthermore PW.1 was the only eye witness in this case, who claimed to see the appellant raping her. To base, a conviction on PW.1 testimony alone, the trial Magistrte was required to give reasons of relying on PW.1 testimony as required under section 127(7) of the Evidence Act. Further the trial Magistrate ought to have warned himself of the danger of convicting the appellant basing on the testimony of PW.1 alone as required by section 127(3) fo the Evidene Act, [Cap.6 R.E 2002]. Nothing is reflected in the trial court's proceeding on whether the trial magistrate was satisfied that the witness was telling nothing but the truth as required by section 127(7) of the act. Also no record, showing that the Magistrate warned himself as required under section 127(3) of the Act. In the case of ***Kassimu Abdallah Vs. The Republic, Criminal Appeal No.99 of 2013, CAT, at Mtwara [unreported] at page 5*** it was held:-

> "The trial court surely was required to warn itself of a danger of relying on the evidence of PW.1..."

Regarding the expert opinion of PW.5 Dr. Kitemi who filed the PF.3 Exhibit P1 and confirmed that PW.1 was raped, I agree with the appellant in his grounds of appeal that the witness never disclosed his qualification, skills and experience when he was giving his testimony. The law is clear that in order for an expert evidence to be admissible the competence of an

expert must be shown. See the case of ***Makame Junedi Mwinyi Vs. Serikali ya Mapinduzi Zanzibar [SMZ] [2000] TLR 455*** which held:-

> "The position of the Law is that expert evidene is admissible in cases where specialized knowledge is required; and **the competence of an expert witness should in all cases be shown before his evidene is properly admissible**..." [emphasis added].

In our case, therefore PW.5's, testimony was inadmissible, in evidence as his competence on that field was not disclosed by him. His qualification, skills experience and his duties are lacking.

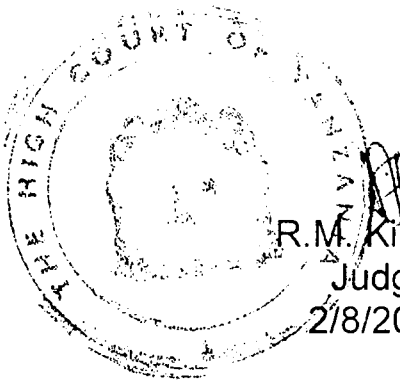
Before I conclude, I wish to agree with Ms. Mangu that the appellant was charged on mere suspicion. In law suspicion however strong can not be a basis for convicting the accused, cases in criminal charges must be proved beyond reasonable doubt.

In the result, I find merit in this appeal, and proceed to quash the conviction, and set aside the sentence imposed by the trial court. It is hereby ordered that the appellant be released forthwith from prison unless otherwise lawful held. Appeal allowed.

R.M. Kibella,
Judge
2/8/2013

Order: Judgment delivered in chambers today 2nd day of August, 2013 in the presence of the appellant in person as well as in the presence of Ms.Mangu, learned State Attorney for the Respondent Republic.

Right of Appeal fully explained.



R.M. Kibella,
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